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AUTHOR Walden, Ruth
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ABSTRACT

An analysis of the Supreme Court's First Amendment decisions under Chief Justice Warren Burger does not indicate any pattern of repudiation of doctrinal advances made by earlier courts. Like its predecessors, the Burger Court has dealt most frequently with First Amendment cases requiring definition and interpretation of government abridgement. In a few such cases, most notably those involving sexually explicit expression, the Court has contracted the conceptual definition of abridgement. In most cases, though, the Burger Court has either left intact previous courts' conceptual definitions of abridgement or expanded the concept to enhance protection for freedom of expression. In a few cases, the Burger Court has been called upon to address the parameters of freedom of speech and press. The Court, following a pattern begun by the Warren Court, consistently has refused to expand the definition of freedom of expression by reading broad protection for the information gathering and editorial processes into the First Amendment. This would suggest that constitutional protection for the newsgathering and editing processes is unlikely to result from Supreme Court redefinition of the parameters of freedom of the press. Consequently the media need to search for creative ways of gaining such protection by focusing on the abridgement aspects of government actions. (Author/HOD)

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ANOTHER LOOK AT THE BURGER COURT AND FREEDOM OF EXPRESSION: A TEXTUAL APPROACH TO FIRST AMENDMENT ANALYSIS

RUTH WALDEN
UNIVERSITY OF UTAH

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Association for Education in Journalism and Mass Communication
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ABSTRACT

ANOTHER LOOK AT THE BURGER COURT AND FREEDOM OF EXPRESSION:
A TEXTUAL APPROACH TO FIRST AMENDMENT ANALYSIS

RUTH WALDEN
UNIVERSITY OF UTAH

Analysis of the Burger Court's First Amendment decisions often results in charges that the Court is regressive, chipping away at freedom of speech and press. This paper addresses the accuracy of that image, using a textual approach to analyze First Amendment decisions. The textual approach focuses on the text of the First Amendment itself, categorizing decisions according to which element of the Amendment they interpret or apply---Congress, law, abridgement, freedom of speech and press. The paper concludes that while the Burger Court is frequently conservative in its empirical definitions of the protective concepts enunciated by earlier courts, it has not engaged in any wholesale repudiation of the First Amendment doctrinal advances of preceding courts.

Most freedom of expression cases decided by the Burger Court have required definition and interpretation of what constitutes a government abridgement of protected freedoms. In a few such cases, most notably those involving sexually explicit expression, the Court has contracted the conceptual definition of abridgement. In most cases, though, the Burger Court has either left intact previous courts' conceptual definitions of abridgement or expanded the concept to enhance protection for freedom of expression. In a few cases, the Burger Court has been called upon to address the parameters of freedom of speech and press. The Court, following a pattern begun by the Warren Court, consistently has refused to expand the definition of freedom of expression by reading broad protection for the information-gathering and editorial processes into the First Amendment. The paper concludes that constitutional protection for the newsgathering and editing processes is unlikely to result from Supreme Court redefinition of the parameters of freedom of the press, and, therefore, the media need search for creative ways of gaining such protection by focusing on the abridgement aspects of government actions.

THE BURGER COURT AND FREEDOM OF EXPRESSION:
A TEXTUAL APPROACH TO FIRST AMENDMENT ANALYSIS

In both popular and scholarly literature attempts have been made to characterize or categorize the Burger Court's First Amendment or press decisions. Often these efforts take the form of comparing the Burger and Warren Courts' responses to freedom of speech and press issues and cases.[1] Such analysis often results in a description of the Burger Court as unresponsive to First Amendment interests---or at least less responsive than the Warren Court. For example, Galloway referred to the Burger Court's "characteristic conservative retrenchment" in a number of important free speech areas and accused the Court of conducting "a vendetta against the press, substantially curtailing the immunities and access rights of the news media."[2] Stempel, in an analysis of press decisions, concluded that the Burger Court was "against the press" more often than preceding Courts during the years 1931-1969.[3] A term frequently used to characterize Burger Court actions relative to First Amendment rights is "chipping away."[4]

The image produced by such analysis and commentary is of a court engaged in regression, retrenchment, reduction of established First Amendment rights. This paper will challenge the accuracy of this image of the Burger Court. In so doing, the paper will suggest a method of categorizing freedom of expression issues and cases that may aid in understanding apparent differences between the Burger Court's and Warren Court's First Amendment records.

A Textual Approach to the First Amendment

In developing First Amendment theory or analyzing judicial decisions involving expression rights, scholars frequently suggest or utilize classification schemes to make sense out of scores of freedom of expression issues and cases. For theorists, such classifications may serve as bases for doctrinal development. Most frequently, such doctrinal structures involve categorizing the expressive acts themselves. Most familiar are Emerson's expression/action and Meiklejohn's public/private speech dichotomies, both of which serve as bases for determining the degree or extent of constitutional protection to be afforded communicative conduct.[5] Baker proposes another doctrinal stucture resting upon a distinction between coercive and noncoercive speech.[6] While Emerson, Meiklejohn and Baker focus on the nature of the expressive act itself, Tribe proposes a method for categorizing government abridgements in his track one/track two analysis. Rejecting Emerson's expression/action distinction, Tribe proposes categorizing alleged abridgements of the First Amendment as (1) government actions "aimed at (the) communicative impact" of expressive actions and (2) government actions "aimed at noncummunicative impact but nonetheless having adverse effects on communicative opportunity."[7] Analysis under Tribe's approach focuses on the nature of the government action, rather than the nature of the expressive act.

Legal commentators also often rely on classification systems to analyze scores of First Amendment issues and cases and thousands of pages of judicial opinions. Stempel, for example, classified judicial opinions as "for" or "against" the press, depending on the legal fate of the media party.[8] Galloway, reviewing all Burger Court decisions from

1969 to 1979, classified decisions as liberal or conservative victories.[9] Cox distinguished between cases involving direct suppression or regulation of publication or expression and those involving the media seeking special privileges, such as immunity from third party search warrants or immunity from identifying confidential sources in judicial proceedings.[10] BeVier referred to "traditional press freedom cases," those involving government interference with the freedom to publish; "access cases," involving questions of public and press access to government-controlled information and places; and "privilege cases," involving grand jury subpoenas, third party search warrants and civil discovery rules.[11]

Since judicial decisions relating to freedom of speech and press are simply efforts to interpret and apply the First amendment to a variety of fact situations, it would appear that a classification system based upon the text of the amendment itself would provide insights into judicial treatment of freedom of expression and a basis for comparing the decisions of different courts. The First Amendment declares, "Congress shall make no law . . . abridging the freedom of speech, or of the press." Throughout the years courts have interpreted the various elements of that declaration, giving meaning to the individual words and phrases, as well as to the whole. For example, in the early 20th century, the meaning of the word "Congress" was given an expansive interpretation when the U.S. Supreme Court decided freedom of speech and press were among the liberties protected against state encroachment by the Fourteenth Amendment.[12] Thus, actions of state legislatures, as well as the federal legislature, became subject to First Amendment scrutiny. Indeed, with little fanfare or notice, throughout the 20th

century courts have interpreted "Congress" to apply to the action of virtually any governmental entity or official---and at times to the actions of even apparently private parties.[13] Simultaneously, the word "law" has been held, or assumed, to apply to virtually any official action taken by a governmental entity or official---a ruling of the National Labor Relations Board; a Federal Communications Commission rule, decision or policy; a revocation of second-class mailing privileges by the postmaster general; judicial contempt citations, gag orders and trial closures; and the suspension of public high school students.[14] Except for the few cases in which attempts were made to impose First Amendment restraints on the actions of seemingly private entities, such as shopping centers, newspapers and broadcasters, the interpretations of the terms "Congress" and "law" have not been significant issues in First Amendment litigation.[15]

The bulk of recent First Amendment litigation has been concerned with determining the meaning of abridgement and the parameters of the concepts of freedom of speech and freedom of press. Determining whether a particular governmental action constitutes an abridgement of protected freedoms entails different issues and inquiry than determining whether a particular private activity falls within the parameters of freedom of expression. The distinction can be seen to some extent in the classification schemes used by Cox and BeVier. What Cox refers to as cases of direct suppression or regulation of publication or expression and BeVier refers to as traditional press freedom cases primarily involve defining abridgement. For example, since the act of publication is clearly within the parameters of freedom of the press, the question in Smith v. Daily Mail was whether imposition of criminal

sanctions for publication of the name of a juvenile accused of a crime constituted an abridgement of that freedom or was instead a legitimate means of protecting the privacy of juvenile offenders and enhancing their rehabilitation.[16] Miller V. California involved the distribution of printed and graphic materials. As early as 1938 the Supreme Court explicitly had declared that the First Amendment protected distribution, as well as publication.[17] The issue, then, in Miller was not whether distribution was a protected freedom but whether imposition of criminal penalties on Miller for distributing his sexually explicit brochures was an abridgement of the freedom to distribute or a valid exercise of the state's police power.[18] In other words, Miller, Smith, as well as many other cases, involved private actions clearly within the parameters of conduct defined as speech and press. The question was whether the government's reactions to that conduct constituted abridgements.

In contrast, cases referred to by Cox and BeVier as access and privilege cases have involved establishing the parameters of the protected freedoms. Thus, in the prison access cases, the question was whether freedom of the press included freedom to gather information under government's control, in addition to freedom to publish and distribute.[19] In Zurcher v. Stanford Daily the issue was whether the parameters of freedom of the press encompassed freedom from unannounced third party searches of newsrooms.[20] And in Branzburg v. Hayes and Herbert v. Lando the issue was whether freedom of the press encompassed a right to shield confidential sources and the editorial decisionmaking process from judicial inquiry.[21] All of those cases required judicial interpretation of what constituted freedom of the press, since all

involved private claims to rights that, unlike the right to speak, publish and distribute, the U.S. Supreme Court never explicitly and definitively had declared within the parameters of the protected freedoms.

Like most theoretical frameworks designed to assist in the explanation of observed phenomena, the one suggested here admittedly contains definitional problems and ambiguities. For example, one may argue that a court decision as to what constitutes protected or unprotected expression actually involves establishing the parameters of freedom of expression rather than defining what constitutes an abridgement. At least on its face, declaring obscenity or malicious defamation outside the purview of First Amendment protection appears to entail drawing the traditional line between liberty and licentiousness. However, the key to the textual approach for analyzing First Amendment cases is the actual private conduct that gave rise to the First Amendment claim---speech, picketing, publication, distribution, refusal to testify or information gathering. Cases involving activities clearly and explicitly protected under the First Amendment because of definitive Supreme Court statements or historical traditions require judicial definition of what constitutes government abridgement, an analysis of the sufficiency of government's reasons for imposing restraints and the effects of such restraints on the free flow of information and opinion. Cases involving claims for protection of conduct that never clearly and definitively has been placed under the umbrella of the First Amendment require judicial establishment of the parameters of freedom of expression. In most instances, these latter types of cases evolve from private efforts to gain constitutional protection for pre-expression

acts, such as information gathering, or post-expression acts, such as shielding sources and editorial decision-making from post-publication inquiry. This textual approach to categorizing and analyzing First Amendment cases will be applied to selected freedom of expression decisions of the Burger and Warren Courts to provide a basis for comparing the rulings of the two courts.

Warren Court Decisions

The Supreme Court led by Chief Justice Earl Warren was a court involved in innovation, expansion and creation in a multitude of legal areas, including freedom of expression. Commentators have described the Warren Court as exhibiting enthusiasm and elan.[22] In the area of First Amendment law, the Warren Court broke new ground, interpreting the Amendment's protections to encourage and enhance the flow of information and ideas and facilitate operation of an open, democratic political system.[23]

With a few notable exceptions, however, the Warren Court's key First Amendment rulings entailed defining what constituted government abridgements of freedom of expression, drawing the line between the legitimate exercise of government power and encroachment on constitutionally protected personal liberties. Review of several major cases will illustrate this point. In New York Times Co. v. Sullivan and Time, Inc. v. Hill, the Court found that under some circumstances the judicial awarding of civil damages against the media could constitute government abridgements of freedom of expression. In Sullivan the Court found that assessing civil liability for the unintentional, non-reckless publication of defamatory falsehoods about a public official was an abridgement of freedom of the press.[24] In Hill the Court held that the imposition of damages in a civil privacy

suit involving a matter of public interest "in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth" was an abridgement of freedom of the press.[25] Clearly both Sullivan and Hill were victories for the media, but neither involved expanding the parameters of the conduct covered by the First Amendment. Both cases involved publication, an activity clearly encompassed by the First Amendment since the time of its adoption. Both cases, however, did entail redefining what government actions constituted abridgements of publication rights.[26]

Other major First Amendment cases of the Warren era also involved definitions of government abridgement. In the 1957 joint obscenity cases of Roth v. United States and Alberts v. California, the private conduct giving rise to the litigation was publication and distribution, conduct clearly covered by the First Amendment. However, the Court ruled that state and federal anti-obscenity laws were not abridgements of the First Amendment, but valid exercises of police power, if the definitions of obscenity contained in such laws met certain standards.[27] Butler v. Michigan struck down a Michigan law designed to control the availability of sex-related materials to minors as an abridgement of freedom of expression. At issue was distribution.[28] Brandenburg v. Ohio held that it was an abridgement of free speech for government to punish the advocacy of the use of force or violation of the law unless such advocacy amounted to incitement to action. The conduct that gave rise to the case was speech.[29] Garrison v. Louisiana found a state criminal libel statute an abridgement of freedom of expression for its failure to incorporate the Sullivan actual malice standard. Garrison's conviction had resulted from

publication and distribution of a statement critical of judges.[30] Wood v. Georgia, finding a contempt of court citation an abridgement of freedom of expression, also involved publication and distribution.[31] All of these cases involved communicative conduct that, either through express judicial declaration or historical tradition, long had been held to be within the parameters of freedom of speech and press. The issue in each case was not whether the conduct per se was entitled to First Amendment protection, but whether the government restraint or sanction constituted an abridgement of protected conduct.

A number of so-called "symbolic expression" cases also required the Warren Court to identify and define government abridgements of freedom of expression. At first glance, it might appear that the symbolic expression cases involved the establishment of the parameters of freedom of speech and press since they required the Court to consider whether the private conduct at issue was entitled to First Amendment protection. However, in those cases the Court was called upon to operationally define symbolic expression, which already had been declared eligible for constitutional protection, not conceptually expand the definition of freedom of expression. As early as 1931 the U.S. Supreme Court had recognized that freedom of expression extended beyond words. In Stromberg v. California, the Hughes Court held unconstitutional a state law prohibiting the display of a red flag "as a sign, symbol, or emblem of opposition to organized government." The Court declared a law permitting punishment of "the fair use" of the "opportunity for free political discussion" abridged freedom of expression.[32] Twelve years later in striking down a requirement that public school children participate in flag salute ceremonies, the Stone

Court made it clear that symbolic acts of expression were within the purview of the First Amendment.[33] Thus, in addressing whether the wearing of black armbands, draft card burning and flag mutilation were conduct protected by the First Amendment, the Warren Court was refining the operational definition of symbolic expression but not expanding the conceptual parameters of the freedoms protected.[34]

Furthermore, in the symbolic expression cases considered by the Warren Court, the decisions turned on government's justifications for attempting to control the private expressive acts, that is, whether the governmental restraints were abridgements of freedom of expression or valid exercises of governmental power designed to serve some substantial public interest. In Tinker v. Des Moines School District the Warren Court defined wearing black armbands as "closely akin to 'pure speech'" and, therefore, "entitled to comprehensive protection under the First Amendment." However, the Court then went on to address the sufficiency of the school officials' reasons for banning and punishing such expression. The Court concluded that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[35] In contrast, in United States v. O'Brien the Warren Court declared that even assuming draft card burning could be classified as symbolic expression, government's interest in prohibiting and punishing such conduct was sufficient to disqualify such restraints as abridgements of free expression. The Court expressed doubt about empirically defining symbolic expression to include draft card burning. But despite the declared doubt, the Court went on to say, "However, even on the assumption that the alleged communicative element in O'Brien's conduct

is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity." The Court set forth a test for determining whether government's action could be defined as an abridgement:

> (W)e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.[36]

The banning of the destruction and mutilation of draft cards met all of those requirements, according to the Warren Court, and, therefore, did not constitute an abridgement of First Amendment rights.

As noted, the Warren Court also dealt, but less frequently, with other elements of the First Amendment. For example, in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, a majority of the Court defined a privately owned shopping center as the functional equivalent of a municipal business district and, therefore, subject via the Fourteenth Amendment to the provisions of the First Amendment. In effect, Logan Valley involved expanding the meaning of "Congress."[37]

While the Warren Court demonstrated a willingness to enhance and expand expression rights by broadly defining what constituted a government abridgement and extending First Amendment prohibitions to a privately owned shopping center, the Court's record when dealing with the parameters of private conduct entitled to First Amendment protection was mixed. The Court extended the concept of freedom of speech and press to encompass certain audience or receiver conduct, but refused to recognize a right to gather information as being within the parameters of protected private conduct.

The Warren Court read the First Amendment to include a private right to "receive information and ideas" in striking down a federal law permitting the Post Office to screen foreign unsealed mail, detain "communist political propaganda" and destroy the mail unless the addressee requested delivery within 20 days.[38] In Stanley v. Georgia the Warren Court extended the right-to-receive protection to include a right to possess obscene materials, the publication and distribution of which could be prohibited constitutionally.[39] Both cases required the Court to consider the nature of the private conduct government sought to control and whether such conduct fell within the parameters of freedom of speech and press. Receipt and possession of communications joined speaking, publishing and distributing as protected conduct, and First Amendment rights were extended to the receiver, as well as the source, channel and message, in the communication chain.

In Zemel v. Rusk the Court considered whether information gathering fell within the parameters of private conduct protected by the First Amendment and concluded it did not. In rejecting the argument that a

State Department ban on travel to Cuba constituted an abridgement of the First Amendment rights of citizens to inform themselves, the Court declared, "The right to speak and publish does not carry with it the unrestrained right to gather information."[40] Although dealing with the Sixth Amendment's right to a fair trial and only indirectly with First Amendment rights, a number of free press/fair trial cases decided by the Warren Court also suggested the Court's rejection of information gathering as part of the First Amendment freedoms. For example, in Estes v. Texas four members of the Court declared that allowing television cameras in the courtroom violated a criminal defendant's right to a fair trial. Writing for the plurality Justice Clark said:

> It is said, however, that the freedoms granted in the First Amendment extend a right to news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between newspapers and television. This is a misconception of the rights of the press.[41]

In addition, in Sheppard v. Maxwell the Warren Court made it clear that the judge bore the responsibility of restricting the flow of information to the media to ensure a criminal defendant's right to a fair trial.[42]

This brief review of Warren Court decisions demonstrates that the Court was progressive and aggressive in protecting communicative conduct from government interference. The Court was willing to expand the definition of government abridgement and carefully scrutinize, and

often reject, the sufficiency of government's justifications for restraints on speech, publication, distribution and symbolic expression. The Warren Court addressed the parameters of freedom of expression only a handful of times. The audience's rights to receive and possess communications were incorporated within the conceptual definition of freedom of expression. However, the Warren Court provided no indication it believed freedom of expression included the right to gather or have access to information.

Burger Court Abridgement Decisions

While the Warren Court has been described as exhibiting enthusiasm and elan, the Burger Court has been characterized as cautious, pragmatic and particularistic.[43] Emerson accuses the Burger Court of a "predilection for ad hoc balancing, failure to take proper account of the dynamics of suppression, and unwillingness to develop innovative doctrine in response to changing needs."[44] What emerges from the cases and commentary is the image of a Court uncomfortable with, unwilling or unable to expound broad principles, umbrella concepts and sweeping doctrine. The Burger Court tends to deal in specifics, definitions, guidelines and criteria. One is left with the impression that the Burger Court constantly attempts to fashion its decisions so as to preserve for itself an escape hatch, in case it subsequently is faced with a similar set of facts but the need to reach an opposite conclusion.

In the area of First Amendment law, the Burger Court's caution and reluctance to innovate can be seen clearly in its refusal to expand the definition of freedom of speech and press to include broad pre- and post-communication rights. However, when the Burger Court has been

faced with the need to identify and define government abridgements of expression, it has shown no marked tendency toward conceptual retrenchment or regression. BeVier noted, "In recent years the Supreme Court has decided several cases in which the press challenged regulation which, if sustained, would have threatened the area of press freedom that previous decisions had established. The Court in these cases fully respected, and even expanded, prior doctrinal boundaries. These traditional cases presented classic First Amendment issues. The challenged regulations fell directly upon particular published material and were triggered by the content of the publication." BeVier describes these traditional cases as dealing with freedom of the press in "its literal and formal sense," that is, dealing with communicative conduct clearly within the established parameters of freedom of expression.[45] Cox supports this observation by noting the Burger Court's continued interpretation of the First Amendment as providing a "strong bulwark . . . against direct suppression or regulation of publication or expression," in contrast to its emphasis on factual inquiry and balancing in cases involving appeals for "a special privilege . . . because of the indirect effects of a generally valid legal obligation."[46]

A review of several Burger Court cases that involved the issue of what constitutes government abridgement indicates that the Court has respected and at times enhanced existing interpretations and definitions of that element of the First Amendment. In one of the Court's most recent press cases, Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue, the court expanded the benchmark ruling of Grosjean v. American Press Co. and held that discriminatory

taxes aimed at the media, even if such taxes are non-punitive, constitute government abridgement of First Amendment rights. For more than 40 years the Grosjean holding that discriminatory and punitive taxes aimed at media violated the First Amendment had provided the definition of abridgement in taxation cases.[47] In Minneapolis Star the state assessed a tax on paper and ink use in excess of $100,000 a year, in effect a tax based upon the size and circulation of newpapers.[48] As previously noted, publication and distribution are activities clearly encompassed within the definition of freedom of the press. The issue in Minneapolis Star, then, was whether the condition the state placed on publication and distribution constituted an abridgement of those rights. The Burger Court concluded it did.

Except when violation of a secrecy oath was at issue, the Burger Court has continued to find prior restraints on communication abridgements of protected freedoms. Nebraska Press Association v. Stuart, in which the Court struck down a judicial gag order prohibiting the publication of information introduced at a public preliminary hearing, and New York Times Co. v. United States, in which the Court refused to support a temporary injunction on publication of the Pentagon Papers, illustrate the Court's continued support for the proposition that prior restraints, except in extremely rare circumstances, constitute abridgements of free expression.[49]

Violation of a secrecy oath, however, provided the Burger Court with the opportunity to uphold a prior restraint without restricting the First Amendment definition of abridgement. In Snepp v. United States, without oral or written arguments, the Court upheld an injunction prohibiting Snepp from further disclosing his experiences as

a CIA agent without agency prepublication review. The Court, however, characterized the case as involving breach of contract, not a First Amendment question, and, therefore, was able to avoid reconciling its holding with existing prior restraint doctrine.[50]

A series of decisions involving restrictions on commercial speech indicated the Burger Court is willing to give broad definition to the term abridgement in certain situations. The traditional approach, dating back to Valentine v. Chrestensen in 1942, held that government regulation of and even prior restraint on commercial speech did not abridge the First Amendment.[51] As noted above, cases involving the issue of "unprotected speech," such as commercial speech, may appear to involve the definition of freedom of speech and press, rather than abridgement. However, the private conduct at issue, publishing and disseminating, is conduct clearly within the long-accepted definition of free expression. The issue, then, becomes one of whether government's justification for restraining or punishing conduct ordinarily protected by the First Amendment is sufficient to overcome the presumption that the restraint constituted an abridgement of protected freedoms. In a string of decisions, beginning with Bigelow v. Virginia in 1975, the Burger Court struck down restrictions on various types of commercial messages as government abridgements of free expression.[52] In keeping with its general cautious, particularistic approach, however, the Court retained for itself an "out" in its handling of commercial speech cases. If the government restriction prohibited the promotion of illegal activity or was justified adequately as a restraint on deception, restrictions on commercial speech were not abridgements but valid exercises of police power or

protection of the public welfare.[53] Despite those limits, however, the Burger Court clearly enhanced the protection available for commercial speech by expanding the definition of government abridgement in the commercial context.

Cases arising from the imposition of government sanctions for the publication of truthful material lawfully obtained provide the best evidence of the Burger Court's willingness to respect and enhance prior definitions of abridgement. In Cox Broadcasting v. Cohn, Landmark Communications, Inc. v. Virginia and Smith v. Daily Mail, the Burger Court held that government sanctions---either in the form of criminal penalties or civil damages---for the publication of truthful material violated the First Amendment. In none of the cases was government able to prove its justification for imposing the sanction was adequate to transform the abridgement into a valid exercise of governmental power.[54] A similar result obtained in Miami Herald Publishing Co. v. Tornillo, in which the Court invalidated a Florida statute granting political candidates a right to reply to newpaper criticism. The Court said the Florida law exacted a "penalty on the basis of the content of a newspaper" and, therefore, constituted an abridgement of freedom of the press. The Court saw no distinction between compelling and forbidding publication in terms of the definition of abridgement.[55]

The Burger Court's defamation and privacy rulings have been some of the leading causes of claims of anti-media attitudes and First Amendment regression. In the defamation cases, Gertz v. Robert Welch, Inc., Time, Inc. v. Firestone, Hutchinson v. Proxmire and Wolston v. Reader's Digest, the Court ruled the complainants were private persons and, therefore, not subject to the actual malice rule.[56] The basic

doctrine had been established by the Warren Court in New York Times v. Sullivan, AP v. Walker and Curtis Publishing Co. v. Butts.[57] For government to award damages to a public official or figure without proof of actual malice constituted an abridgement of First Amendment rights. The Burger Court toyed with expansion of that basic doctrine in Rosenbloom v. Metromedia, but only a plurality, consisting of the Chief Justice and Justices Brennan and Blackmun, supported extending the actual malice rule to cover any report that was a "matter of public interest."[58] In Gertz, a five-member majority abandoned the "matter of public interest" standard and decided the actual malice rule would be applied on the basis of the status of the plaintiff, not the nature of the report. Gertz, despite some prominence in community and professional affairs, was a private person, the Court ruled.

Antipathy toward the media or insensitivity to First Amendment interests is, of course, a possible explanation for the Burger Court's "anti-press" defamation rulings.[59] There is another possible explanation, however. The "anti-press" aspects of Gertz, Firestone, Hutchinson and Wolston resulted from the Burger Court applying doctrine and operationally defining concepts enunciated by the Warren Court. The Warren Court broke new ground, enunciated broad principles, tests, doctrines and concepts. The task of giving empirical meaning to these concepts, doctrines, tests and principles has fallen largely on subsequent courts, including the Burger Supreme Court. The Burger Court frequently had faced the necessity of setting limits, establishing criteria, developing operational definitions. Many empirical researchers would concede that devising operational definitions of concepts is one of the most difficult and subjective aspects of applying theory to the real world.

The Warren Court in Butts and Walker held that public figures would have to prove actual malice in defamation suits. The Court agreed that retired Major General Edwin A. Walker, who resigned from the Army amidst a storm of controversy and visibly injected himself into demonstrations over the integration of the University of Mississippi, and Wallace Butts, well-known former athletic director at the University of Georgia, were public figures. But later courts often had to deal with closer calls---Elmer Gertz, a Chicago attorney hired to bring a civil action against a police officer who shot and killed a man; Ilya Wolston, who 20 years earlier had failed to respond to a subpoena from a grand jury investigating Soviet espionage; Ronald Hutchinson, research director at a government facility using government money to study monkeys' responses to aggravating stimuli.

Of course, a different court with different perspectives on jurisprudence, philosophical and political orientations, attitudes and values might have defined and applied the public figure concept diffferently than did the Burger Court. We might speculate that the Warren Court in operationalizing its public figure concept would have placed greater emphasis on First Amendment values and less emphasis on the individual's right to reputation. Indeed, this discussion of Burger Court defamation rulings is not meant to imply that the Court's application of the public figure concept was either "correct" or desirable from a freedom of expression perspective. However, in comparing the Warren Court's decisions in Sullivan, Butts and Walker with the Burger Court's decisions in Gertz, Firestone, Hutchinson and Wolston, it is important to note that the former cases involved primarily doctrine and concept enunciation, while the latter involved

primarily doctrine and concept application. Furthermore, if one looks at only the end result of the Butts case--the Warren Court's operationalizing of one of its own concepts, actual malice--Butts too becomes an "anti-press" decision. The Court found sufficient empirical evidence of reckless disregard for the truth to support the trial court's damage award. The Saturday Evening Post lost.[60]

In addition, if one considers the doctrinal development aspects of Gertz, the case takes on aspects of a "pro-press" decision. The Burger Court expanded protection for the media by establishing as a First Amendment requirement that states require, at a minimum, proof of negligence in private person defamation suits. Thus, the long-standing doctrine of "strict liability" was eliminated. The Court held that proof of actual damage to reputation was required, sweeping away the traditional presumption of harm from libel per se. Futhermore, the Court prohibited any defamation plaintiff, private or public, from collecting punitive damages without proof of actual malice. Finally, the Court elaborated the public figure concept to include not only persons of general fame and notoriety, but also persons who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[61] Thus, while the media parties in Burger Court defamation cases have lost, the Court has provided some victories for the press.

Media parties have fared badly in the Burger Court's privacy decisions as well. In one case, Cantrell v. Forest City Publishing Co., however, the Court again was involved primarily in applying Warren Court doctrine to a specific fact situation.[62] In the other, Zacchini v. Scripps-Howard Broadcasting Co., the Court broke new

ground.[63] Cantrell was a false light invasion of privacy suit in which the Court, following the standard established seven years earlier in Time, Inc. v. Hill, found sufficient evidence of "calculated falsehoods" to support a finding of actual malice. While the media defendants lost the Cantrell case, it hardly can be classified as a regressive decision. The Burger Court did not reduce the First Amendment protection provided the media in false light cases in Hill, but simply applied the Hill standard to a set of facts that indicated knowing, or at least reckless, falsification. Indeed, Cantrell provided the Burger Court with the opportunity to reduce the media's protection in false report privacy cases, an opportunity the Court did not take. The Warren Court's original application of an actual malice standard in false light privacy cases predated the Gertz public/private person distinction in defamation actions.The Cantrell decision was handed down six months after Gertz. The Burger Court could have reduced the media's protection in privacy litigation by focusing on the status of the plaintiff instead of the nature of the matter reported. Clearly Mrs. Cantrell would not have met the limited public figure definition of Gertz since she in no way thrust herself into a matter of public interest or controversy. The Court, however, stuck by the Warren Court doctrine.

In contrast, Zacchini, the Court's first foray into the emerging "right of publicity," provides an example of the Burger Court clearly diminishing the First Amendment protection available to the media by redefining what constitutes a government abridgement of freedom of the press. In Zacchini, the Court on a 5-4 vote ruled that it did not violate the First Amendment for a state court to allow a performer to

collect damages for invasion of his right of publicity if a television station broadcast the performer's "entire act" without consent. In reaching this conclusion, the Court ignored a traditional element of invasion of right of publicity actions: the defendant's purpose in appropriating the plaintiff's name, likeness or performance. Traditionally, a crucial element in establishing misappropriation or invasion of the right of publicity is evidence that the offending use was for trade or commercial purposes. In Zacchini the Human Cannonball's act was shown during a news broadcast. Prior to Zacchini several courts had ruled it would be an abridgement of the First Amendment to allow plaintiffs to collect damages when their names, likenesses or other valuable attributes had been used for purposes of news, information or history.[64] Newsworthiness, one of the most widely recognized defenses to invasion of privacy suits, was ignored by the Burger Court in Zacchini. While the "entire act" doctrine established by the Court did constitute a diminution of the protection available to the media in right of publicity cases, the decision is unlikely to have any significant impact on the media since few performers have entire acts lasting 15 seconds.

The area in which the Burger Court has shown he greatest tendency to reduce First Amendment protection by redefining what constitutes a government abridgement of freedom of expression is obscenity and "offensive" speech. As Emerson has noted, at least a plurality of the Burger Court has shown a marked tendency to take into account the "social value of a particular communication in determining whether or to what extent such expression will be protected under the first amendment."[65] Obscene and indecent communication has little or no

social value and, therefore, is entitled to little or no constitutional protection in the eyes of several justices.

The Burger Court's alterations in the Roth/Memoirs definition of obscenity were designed to make it easier for states to prohibit and punish obscene communication.[66] In Miller v. California, the Burger Court declared that local, not national, standards would govern obscenity determinations and replaced the Memoirs "utterly without redeeming social value" language with the ostensibly more restrictive test of lacking in "serious literary, artistic, political, or scientific value."[67] In effect, the Burger Court broadened the conceptual definition of obscenity, thereby narrowing the definition of what constitutes government abridgement of expression rights in the area of sexually explicit communication.

Perhaps more restrictive, though, than the Court's redefinition of obscenity has been its willingness to uphold regulation of non-obscene, indecent or offensive communication. Determining whether government regulation or restriction constitutes an abridgement of freedom of expression entails consideration of the sufficiency of government's reasons for imposing the restraints and the effects of the restraints on expression. When it comes to offensive communication, the Burger Court has appeared quite receptive to government justifications for control. For example, in Young v. American Mini Theatres, Inc., the Court upheld a Detroit zoning ordinance restricting the location of movie theaters showing sexually explicit, though not obscene, films. The Court accepted the city's justification of the ordinance as a means of improving and protecting neighborhoods with only an incidental effect on expression. The plurality opinion in Young provides some

clear indication that at least four members of the Burger Court do not include certain government controls on sexually explicit communication within the definition of the term abridgement.

> (F)ew of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.[68]

FCC v. Pacifica Foundation provided another example of the Burger Court's willingness to redefine what constitutes government abridgement when offensive content is at issue. In Pacifica a plurality stated that the type of speech contained in George Carlin's "Filthy Words" monologue did not rank high "in the hierarchy of First Amendment values." Thus, the FCC's justification for channeling such speech---the intrusiveness and pervasiveness of the broadcast media and the presence of children in the audience---were adequate to overcome the presumption that government regulation of non-obscene speech constituted an abridgement of free expression.[69]

It is arguable that even in the area of government restrictions on offensive, but not obscene, communication the Burger Court is simply empirically applying doctrine established by the Warren Court, rather than creating new definitions of abridgement. Indeed the Burger Court

did inherit the doctrine of time, place and manner restrictions allowing certain restraints on expression if designed to further significant government interests. Emerson suggests that in Young, for example, the Court was applying the balancing test enunciated by the Warren Court in United States v. O'Brien, discussed and quoted above.[70]

Although the preceding review of Burger Court cases addressing the question of what constitutes a government abridgement of freedom of expression is admittedly neither comprehensive nor in-depth, it does serve to illustrate the contention that the Burger Court has not engaged in any wholesale redefinition of what constitutes government abridgement of freedom of expression or repudiation of earlier courts' doctrines. The Burger Court has continued to follow the prior restraint doctrine announced by the Hughes Court in Near v. Minnesota;[71] it has expanded the definition of unconstitutional taxes on media; it has enhanced greatly the protection available for commercial and corporate speech; it has protected the media from punishment for the publication of truthful information lawfully obtained; and it has declared that government compelling publication is an abridgement of freedom of the press just as is government prohibition of publication. In the defamation and false light privacy cases it has heard, the Burger Court has not retreated from the protective doctrines enunciated by the Warren Court, but it has applied conservative operational definitions to the concepts handed down to it, most notably the public figure concept. While this approach has resulted in decisions adverse to the media parties in the litigation, it has left intact the Sullivan, Butts/Walker and Hill advances in

defamation and privacy doctrine. And in Gertz the Burger Court continued the pro-media doctrinal development by enunciating additional First Amendment limitations on defamation actions.

Only in the Zacchini right of publicity case and in several cases involving sexually explicit and offensive communication has the Burger Court demonstrated a tendency to regress in its definition of government abridgements. Zacchini is an anomaly and fortunately is unlikely to have any significant effect on the developing right of publicity. The Burger Court's rulings in cases involving obscene and indecent communication may be more a reflection of a pro-law enforcement attitude than an anti-media or freedom of expression stance. Obscenity is one of the few forms of communication defined as a crime. The Young Detroit zoning ordinance case carried heavy overtones of crime prevention and neighborhood protection, and Pacifica involved a portion of the U.S. Criminal Code prohibiting the broadcast of obscene, indecent or profane language.[72] Regardless of the reasons for Burger Court support of time, place and manner restrictions on indecent communication, there is little evidence that such attitudes are spilling over into other types of communication.

Considering the Parameters of Freedom of Speech and Press

The Burger Court consistently has rejected requests to expand the definition of freedom of speech and press to encompass broad information-gathering rights. However, the Court has read into the First Amendment a limited right of access to judicial proceedings. Following the pattern set by the Warren Court in Zemel v. Rusk, the Burger Court in 1974 refused to read a right of access to government-controlled information into the First Amendment. In the

twin cases of Pell v. Procunier and Saxbe v. Washington Post, the Burger Court on a 5-4 vote refused to strike down regulations restricting the access of reporters to prisoners in U.S. and California penal institutions.[73] Citing Chief Justice Warren's opinion in Zemel for support, the majority in Pell declared:

> The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.[74]

That conclusion was supported four years later in Houchins v. KQED, involving limitations on media access to a county jail in California. In the opinion of the Court, Chief Justice Burger said, "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." Referring to dicta from Branzburg v. Hayes alluding to the existence of First Amendment protection for newsgathering activities, the Chief Justice said, "There is an undoubted right to gather news 'from any source by means within the law,'. . . but that affords no basis for the claim that the First Amendment compels others---private persons or government---to supply information." Again the Court cited Zemel for support.[75]

The access-to-information case that caused the greatest surprise and dismay among the media was decided by the Burger Court in 1979 and resulted from the closure of a pretrial evidence suppression hearing in a New York trial court. A majority of the Court in Gannett v.

DePasquale upheld the closure, declaring it violated neither the Sixth Amendment's guarantee of a public trial nor the First Amendment's guarantee of freedom of speech and press. While five members of the Court apparently agreed that the Sixth Amendment's guarantee of a public trial was personal to the defendant and not a right independently enforceable by the press or public, a majority view on the First Amendment issue is more difficult to glean from the five opinions issued in Gannett. Justice Stewart in the opinion of the Court said it was unnecessary to decide whether the First Amendment provided the media with any access rights to pretrial proceedings because even assuming such rights existed, the trial court had adequately balanced the media's rights against the right of the defendant to a fair trial. Justice Powell, who concurred in the Stewart opinion, wrote a separate concurrence to underscore his opinion that the First Amendment definitely provided the media with a right to attend pretrial hearings, but that right was not absolute and had to be balanced against the defendant's right to a fair trial. Powell contended that the press and public present when a closure motion was made had to be given the opportunity to object and argue their case for openness. Judge DePasquale had met these requirements in Powell's view. Of the five-member majority, only Justice Rehnquist definitely rejected the notion of a limited First Amendment right of access to pretrial proceedings. The First Amendment, according to Rehnquist, is not "some sort of constitutional 'sunshine law' that requres notice, and opportunity to be heard and substantial reasons before a governmental proceeding may be closed to the public and press."[76] The four dissenters---Blackmun, Brennan, White and Marshall---did not

address the First Amendment issue, arguing that the Sixth Amendment provided the press and public a limited access right to pretrial hearings. This limited access right required judges to consider three criteria before closing a pretrial hearing: whether an open proceeding would cause irreparable harm to the defendant's fair trial rights, whether closure would be successful in protecting the defendant's rights and whether alternatives were available.[77]

The texts of the Gannett opinions provided little guidance for either the jurist or the scholar trying to determine whether a majority of the Burger Court would redefine freedom of speech and press to encompass a limited right of access to pretrial proceedings. One justice, Rehnquist, clearly would not expand the definition. One justice, Powell, clearly would. Three others were willing to assume the existence of some limited information-gathering rights relative to pretrial hearings, while the four dissenters did not address First Amendment issues. Subsequent rulings of the Supreme Court dealing with access to trials, coupled with lower court interpretations and applications of Gannett fashioning a limited constitutional right of access to pretrial proceedings out of the Powell and Blackmun opinions, however, support the conclusion that, in effect, Gannett constitutes a definition of freedom of speech and press that includes a qualified right of access to pretrial proceedings.[78] In Richmond Newspapers, Inc. v. Virginia, decided a year after Gannett, the Burger Court held 7-1 that freedom of expression encompassed a right of access to criminal trials. In his opinion for the Court, Chief Justice Burger declared, "In guaranteeing freedoms such as those of speech and press the First Amendment can be read as protecting the right of everyone to

attend trials so as to give meaning to those explicit guarantees."[79] Only Justice Rehnquist dissented.[80]

In both the prison-access and court-access cases, the Burger Court carefully emphasized the underlying premise that the access-to-information rights of the press and public are coextensive. This reluctance to provide the media with rights not available to the general public, a refusal to interpret "of the press" as a distinct element in the First Amendment separate from freedom of speech, provides perhaps the best explanation for the Burger Court's decisions in what BeVier calls the "press privilege" cases: Branzburg v. Hayes, Zurcher v. Stanford Daily and Herbert v. Lando.[81] While all three cases involved journalists seeking the protection of the First Amendment after the relevant communication had occurred, the media parties framed their arguments in terms of First Amendment protection for the newsgathering and editorial processes, pre-communication activities. The basic argument in all three cases was that freedom of the press encompasses newgathering and editorial processing. The Burger Court was no more willing to grant the media broad immunity from government inquiry into and interference with their newsgathering and editing functions than it was to grant the media broad access rights to government-controlled information sources.

In Branzburg Justice White wrote the opinion of the Court in which three other justices concurred, refusing to grant the reporters immunity from revealing confidential sources to grand juries. White said the First Amendment did provide some protection for newsgathering, the dictum to which the Chief Justice later referred in Houchins. However, White also declared, "It has generally been held that the

First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." The Court noted that despite the obvious hindrance to newsgathering, the media, along with the public, were excluded from all sorts of secret government proceedings, including "our own conferences." Just as the media could claim no special access-to-information privileges, they could claim no immunity from subpoenas.

> The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and answer questions relevant to an investigation into the commission of crime. Citizens generally are not immune from grand jury subpoenas, and neither the First Amendment nor other constitutional provisions protect the average citizen from disclosing to a grand jury information that he has received in confidence.[82]

As with Gannett, lower courts, however, in interpreting and applying Branzburg frequently have gleaned from it a recogntion of a limited First Amendment right to shield sources. By piecing together the opinions of the four dissenters and the concurring opinion of Justice Powell, in which he contended the First Amendment does provide a qualified privilege for journalists, many lower courts have derived a balancing test for determining when journalists should be forced to testify.[83] Thus, as with Gannett, in effect the Burger Court provided the basis for including a qualified right to shield confidential sources in the definition of freedom of the press.

In both Zurcher and Herbert the Court brushed aside concerns over the impact of the decisions on newsgathering and the editorial process, contending that such concerns already had been considered and the balance struck by the Court's predecessors. In Zurcher, involving the constitutionality of a third-party search of the Stanford Daily newsroom, Justice White said that the authors of the Constitution were aware of the way in which search warrants historically had been used to harass the press but, nonetheless, provided no exceptions in the Fourth Amendment to protect the press. "The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance...," White said. Furthermore, the majority was confident that magistrates would guard against searches that would intrude upon or interfere with the press' ability to gather, edit and disseminate the news.[84] In Herbert, involving a journalist's claim for exemption from general pretrial discovery rules in a public figure defamation action, the Court said that New York Times v. Sullivan made "focus on the conduct and state of mind of the defendant" essential. Proving knowledge of falsity or reckless disregard of the truth inevitably means "the thoughts and editorial processes of the alleged defamer would be open to examination," the Court said. Therefore, the Sullivan Court in establishing the actual malice rule had settled the issue by opting for a standard that required probing of the editorial process.[85] Thus, the Burger Court refused to expand the definition of freedom of the press to protect the media from third party searches or libel discovery proceedings that probed the journalist's state of mind and the editorial process in general.

The Burger Court, then, has refused to define freedom of expression as encompassing broad or unqualified information-gathering rights or protection for the newgathering and editorial processes. The Court has acknowledged the existence of a limited right of access to certain judicial proceedings and, in effect, because of its divided opinion in Branzburg has provided support for a qualified First Amendment shield privilege. None of the Burger Court's rulings involving the parameters of freedom of speech and press, however, accurately can be termed regressive. Instead, they can best be characterized as conservative in the sense of maintaining the status quo. The prison access cases maintained the pattern established in Zemel v. Rusk by the Warren Court. Gannett and Richmond Newspapers also must be viewed as decisions maintaining the status quo, neither increasing nor diminishing the definition of freedom of expression. Both before and after Gannett trial judges closed pretrial proceedings, some with little or no cause or consideration and some after serious and cautious evaluation of the competing interests. They key effect of Gannett was to provide judges ordering closures with a Supreme Court holding to support their decisions and judges refusing closures with the Powell and Blackmun opinions to support their decisions. In Richmond Newspapers Chief Justice Burger's opinion was based upon "the history of criminal trials being presumptively open since long before the Constitution."[86] In the Court's view, the ruling was simply a judicial reaffirmation of a right traditionally encompassed by the right of freedom of expression.

Despite the outcries of retrenchment and regression they generated, Branzburg, Zurcher and Herbert did not involve an alteration in the

definition of freedom of the press. As early as 1958 in Garland v. Torre federal courts had declared that the First Amendment provides journalists with no shield to protect confidential sources.[87] As with Gannett, both before and after Branzburg some judges recognized First Amendment claims of protection from testifying, and some did not.[88] With regard to newroom searches, Anthony Lewis reported 15 police searches of newsrooms prior to the 1971 search of the Stanford Daily.[89] Teeter and Singer reported at least 14 searches between 1971 and 1978, the year of the Supreme Court ruling, despite the fact that both a federal district court and circuit court of appeals had ruled the Stanford Daily search illegal.[90] Congress finally altered the status quo in 1980 by passing the Privacy Protection Act outlawing newsroom searches except in unusual circumstances.[91] Nor did Herbert break any new ground. As Justice White noted, for decades journalists had testified about their thoughts, actions, and motives to protect themselves from libel verdicts. According to Nelson and Teeter:

> A few newspaper editorials and media voices recognized that the Herbert decision had broken no new ground and presented no fresh menace to the First Amendment. . . . The response of those dismayed was an example of the ahistorical reaction of journalists to various decisions on First Amendment questions that had never before the 1970s reached the Supreme Court. Alarmed reactions of dismay over presumed new damage by the Court to the First Amendment were often without understanding

> that what the Court was finding was in line with what lower courts had found for decades or for a century. The press reaction spoke eloquently to journalists' superficial education in the history of press freedom. . . .[92]

Conclusions

The stated purpose of this paper was to challenge the accuracy of the image of the Burger Court as a regressive body, chipping away at the First Amendment strides of preceding courts. Although admittedly not comprehensive, the survey of Burger Court cases does not indicate any pattern of repudiation of doctrinal advances made by earlier courts. Like its predecessors, the Burger Court most frequently has dealt with First Amendment cases requiring definition and interpretation of government abridgement. In several instances, the Burger Court has been progressive, expanding the conceptual definition of abridgement to encompass non-punitive discriminatory taxes on media, restrictions on commercial speech that are not adequately justified as preventions of deception or of the promotion of illegal activity, the awarding of civil damages to private libel plaintiffs who do not prove at least negligence, the awarding of punitive damages to libel plaintiffs who do not prove actual malice. In several instances, the Burger Court has been regressive, contracting the conceptual definition of abridgement by failing to take into account the newsworthiness of the broadcast in the Zacchini right of publicity case, by altering the definition of obscenity, by indicating that offensive, but non-obscene communication can be subjected to greater government regulation than communication of greater "social value." In other instances, the

Burger Court has made no alterations in the conceptual definition of abridgement, but simply has applied the definitions of prior restraint, post-publication punishment, public figure and actual malice enunciated by earlier courts. At times the Court has been liberal in its empirical definitions of concepts enunciated by other courts; at other times it has been conservative. The important point, however, is that the Burger Court has left intact much of the First Amendment doctrine developed by the Warren Court and preceding Supreme Courts.

In cases requiring consideration of the parameters of freedom of speech and press, the Burger Court consistently has refused to conceptually expand the definition of freedom of expression. The Court repeatedly has rejected requests to incorporate broad protection for newsgathering and the editorial process into the First Amendment. The Court, however, has incorporated a limited right of access to judicial proceedings, and Branzburg is resulting in increasing lower court recognition of a qualified First Amendment shield privilege. The Court's refusals to define freedom of expression as encompassing broad rights of access to government-controlled information and protection from government interference with the gathering and processing of news have been refusals to expand the parameters of freedom of speech and press, not curtailments of existing rights and immunities.

As Emerson noted, the Burger Court has demonstrated an unwillingness to develop innovative doctrine, and innovative doctrine is what is required to expand the definition of freedom of expression to include more than speaking, writing, publishing, distributing, symbolic expression and the audience's right to receive and possess communications. What the preceding textual approach to First Amendment

analysis indicates is that the Supreme Court is much more receptive to expanding the definition of government abridgement than it is to expanding the parameters of the protected freedoms. The message for the media, then, is to avoid Supreme Court "defeats" and the establishment of potentially limiting precedent by refraining from asking the Court to support innovations in the conceptual definition of freedom of expression. This is not to suggest that the media should stop pressing for constitutional protection for newsgathering and the editorial process. Instead, the media must take on the innovative and creative role eschewed by the Court and fashion arguments focusing on the concept of government abridgements. For example, BeVier suggests that in both Branzburg and Zurcher abridgement arguments could have been developed, eliminating the need to stake victory on the Court's acceptance of newgathering as a constitutionally protected activity.

> Quite ignored . . . were the facts that the subpoenas in Branzburg and the search in Zurcher had followed directly upon and seemed indeed to be consequences of the publication of information of clear political relevance. Given this context, the procedures became analogous to subsequent punishment of political speech and this implicated press freedom to publish in a rather direct way. . . .
>
> The analogy to subsequent punishment is not a perfect one, of course, since the government did not purport to sanction publication by threaten- in the press with loss of liberty pursuant to legislation proscribing publication of particular

> kinds of information. The analogy is apt, however because in each of the cases publication of politically relevant information was followed by government action which clearly imposed costs upon the publication and this rendered the publishing decision less free from and more susceptible to governmental coercion that it would have been had the power not existed to issue the suppoenas or conduct the search. Whether the Court would have found the analogy persuasive is not the point here. The point is that the Court's attention was never drawn to the coercive, freedom-threatening aspects of the challenged procedures in Branzburg and Zurcher. . . . [93]

There is, of course, no way of knowing whether refocusing the issues in Branzburg and Zurcher from the parameters of freedom of the press to the definition of abridgement would have altered the outcomes. Analysis of Supreme Court decisions based on a textual approach to the First Amendment, however, indicates that in the future the media's best chances for Supreme Court victories will be in cases focusing on the meaning of the term abridgement.

NOTES

[1]See, for example, Guido H. Stempel III, "A Gutman Scale Analysis of the Burger Court's Press Decisions," Journalism Quarterly 59:256 (1982); Russell W. Galloway Jr., "The First Decade of the Burger Court: Conservative Dominance," Santa Clara Law Review 21:891 (1981); Martin Garbus, "New Challenge to Press Freedom," The New York Times Magazine, Jan. 19, 1984, p. 34.

[2]Galloway, p. 937.

[3]Stempel, p. 257.

[4]"Editorial: The First Amendment in Jeopardy," The News Media and the Law, Vol. 6, No. 2 (June-July 1982), inside front cover; Michael F. Buchicchio, "Chipping Away at the First Amendment: Newspapermen Must Disclose Sources," Akron Law Review 7:129 (1973).

[5]Thomas I. Emerson, The System of Freedom of Expression, New York: Random House, 1970; Alexander Meiklejohn, Free Speech and Its Relation to Self Government, Port Washington, N.Y.: Kennikat Press, 1972.

[6]C. Edwin Baker, "Scope of the First Amendment Freedom of Speech," U.C.L.A. Law Review 25:964 (1978).

[7]Laurence Tribe, American Constitutional Law, Mineola, N.Y. : Foundation Press, 1976, pp. 580-601.

[8]Stempel.

[9]Galloway.

[10]Archibald Cox, "Foreword: Freedom of Expression in the Burger Court," Harvard Law Review 94:1 (1980), p. 55.

[11]Lillian R. BeVier, "An Informed Public, An Informing Press: The Search for a Constitutional Principle," California Law Review 68:482 (1980), pp. 485-497.

[12]Gitlow v. New York, 268 U.S. 652 (1925); Near v. Minnesota, 283 U.S. 697 (1931).

[13]For example the actions of administrative agencies and the executive branch have been subjected to constitutional review in such cases as AP v. National Labor Relations Board, 301 U.S. 103 (1937); Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932); and Hannegan v. Esquire, 327 U.S. 146 (1946); courts were held subject to First Amendment requirements in such cases as Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); and Craig v. Harney, 331 U.S. 367 (1947); municipalities and school boards have been considered subject to First Amendment restraints in such

cases as Tinker v. Des Moines School District, 393 U.S. 503 (1969); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (D.C. Wis. 1969), aff'd, 441 F.2d 1257 (7th Cir. 1971; and Breard v. Alexandria, 341 U.S. 622 (1951); and private entities, if their actions have been sufficiently imbued with state action, have been subject to First Amendment review in Marsh v. Alabama, 326 U.S. 501 (1946); and Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

[14]AP v. NLRB, 301 U.S. 103 (1937); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Hannegan v. Esquire, 327 U.S. 146 (1946); Bridges v. California, 314 U.S. 252 (1941); Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Tinker v. Des Moines School District, 393 U.S. 503 (1969).

[15]Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Lloyd Corp. v. Tanner, 407 U. S. 551 (1972); Hudgens v. NLRB, 424 U.1S. 507 (1976); Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D.C. Colo. 1971); Chicago Joint Board, Amalgamated Clothing Workers of America v. Chicago Tribune Co., 307 F. Supp. 422 (N.D. Ill. 1969), aff'd, 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); CBS v. Democratic National Committee, 412 U.S. 94 (1973).

[16]443 U.S. 97 (1979).

[17]Lovell v. City of Griffin, 303 U.S. 444 (1938).

[18]413 U.S. 15 (1973).

[19]Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Houchins v. KQED, 438 U.S. 1 (1978).

[20]436 U.S. 547 (1978).

[21]Branzburg v. Hayes, 408 U.S. 665 (1972); Herbert v. Lando, 441 U.S. 153 (1979).

[22]Cox, p. 15; Robert E. Riggs, "The Burger Court and Individual Rights: Commercial Speech as a Case Study," Santa Clara Law Review 21:957 (1981), p. 959.

[23]Archibald Cox, The Warren Court, Cambridge, Mass.: Harvard University Press, 1968, p. 92.

[24]376 U.S. 254 (1964).

[25]385 U.S. 374, 388 (1967).

[26]For an alternative interpretation, see Melville B. Nimmer, "The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy," California Law Review 56:935 (1968), p. 943. Nimmer characterizes the Sullivan decision as defining what constitutes "'speech' within the meaning of the first amendment."

[27]354 U.S. 476 (1957).

[28]352 U.S. 380 (1957).

[29]395 U.S. 444 (1969).

[30]379 U.S. 64 (1964).

[31]370 U.S. 375 (1962).

[32]283 U.S. 359, 369 (1931).

[33]West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)

[34]Tinker v. Des Moines School District, 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968); Street v. New York, 394 U.S. 576 (1975).

[35]393 U.S. 503, 505-506, 508 (1969)

[36]391 U.S. 367, 376-377 (1968).

[37]391 U.S. 308 (1968).

[38]Lamont v. Postmaster General, 381 U.S. 301 (1965).

[39]394 U.S. 557 (1969).

[40]382 U.S. 1, 17-18 (1965)

[41]381 U.S. 532, 538-539 (1965).

[42]384 U.S. 333, 358-361 (1966).

[43]Cox, "Foreword: Freedom of Expression in the Burger Court," pp. 15-16

[44]Thomas I. Emerson, "First Amendment Doctrine and the Burger Court," California Law Review 68:422 (1980), p. 423.

[45]BeVier, p. 486.

[46]Cox, "Foreword: Freedom of Expression in the Burger Court," p. 55. See also Steven Cann, "Drawing a line on freedom of the press: The Burger Court picks up the chalk," Judicature 66:296 (1983).

[47]297 U.S. 233 (1936).

[48]9 Med. L. Rptr. 1369 (1983).

[49]Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. U.S., 402 U.S. 713 (1971). Also see Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

[50]444 U. S. 507 (1980).

[51]316 U.S. 52 (1942).

[52]421 U.S. 809 (1975); Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U. S. 748 (1976); Bates v. State Bar of Arizona, 431 U.S. 350 (1977); Linmark Associates v. Township of Willingboro, 431 U.S. 85 (1977); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980); In re R. M. J., 455 U.S. 191 (1982).

[53]Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U. S. 376 (1973); Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); Friedman v. Rogers, 440 U.S. 1 (1979).

[54]Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Smith v. Daily Mail, 443 U.S. 97 (1979).

[55]418 U.S. 241, 256-258 (1974).

[56]Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest, 443 U.S. 157 (1979).

[57]New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Publishing Co. v. Butts and AP v. Walker, 388 U.S. 130 (1967).

[58]403 U.S. 29, 43-45 (1971).

[59]Stempel.

[60]388 U.S. 130, 157-158 (1967).

[61]418 U.S. 323, 345, 347-350 (1974).

[62]419 U.S. 245 (1974).

[63]433 U.S. 562 (1977).

[64]Garner v. Triangle Publications Co., 97 F. Supp. 546 (D.N.Y. 1951); Dallesandro v. Henry Holt & Co., 166 N.Y.S.2d 805 (1957); Murray v. New York Magazine, 318 N.Y.S.2d 474 (1971).

[65]Emerson, "First Amendment Doctrine and the Burger Court," p. 452.

[66]Roth v. U.S., 354 U.S. 476 (1957); Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966).

[67]413 U.S. 15, 23-24 (1973).

[68]427 U.S. 66, 70-71 (1976). See also California v. LaRue, 409 U.S. 109 (1972).

[69]438 U.S. 726, 746-751 (1978).

[70]Emerson, "First Amendment Doctrine and the Burger Court," pp. 450-451.

[71]288 U. S. 697 (1931).

[72]18 U. S. C. 1464 (1981).

[73]Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[74]417 U.S. 817, 834 (1974).

[75]438 U.S. 1, 11, 15 (1978).

[76]443 U.S. 368, 405 (1979).

[77]Ibid., 441-442.

[78]See, for example, U.S. v. Criden, 675 F.2d 550 (3d Cir. 1982); U.S. v. Brooklier, 685 F.2d 1162 (9th Cir. 1982); U.S. v. Dorfman, 8 Med. L. Rptr. 2177 (9th Cir. 1982); Miami Herald v. Lewis, 8 Med. L. Rptr. 2281 (Fla. S.C. 1982).

[79]448 U.S. 555, 575 (1980).

[80]See also Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[81]Bevier, p. 483.

[82]408 U.S. 665, 682, 684-685 (1972).

[83]Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); U.S. v. Orsini, 424 F. Supp. 229 (E.D. N.Y. 1976); U.S. v. Hubbard, 493 F. Supp. 202 (D.C.D.C. 1979); Riley v. Chester, 612 F.2d 708 (3d Cir. 1979).

[84]436 U.S. 547, 559, 565-566 (1978).

[85]441 U.S. 153, 160 (1979).

[86]448 U.S. 555, 575 (1980).

[87]259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958).

[88]Note 83 lists several cases in which First Amendment privilege claims were recognized. Cases in which such claims were rejected include Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (1977); and In re Farber, 78 N.J. 259, 394 A.2d 330 (1978).

[89]Don R. Pember, Mass Media Law, Dubuque, Ia.: William C. Brown, 1984, p. 307.

[90]Harold L. Nelson and Dwight L. Teeter Jr., Law of Mass Communications, Mineola, N.Y.: Foundation Press, 1982, p. 389.

[91]42 U. S. C. 2000aa (1983).

[92]Nelson and Teeter, p. 135.

[93]BeVier, p. 495, note 59.